IN THE MATTER OF THE HUMAN RIGHTS CODE R.S.O. 1881, 1990,C. H-19

AND IN THE MATTER OF THE COMPLAINT OF NANCY HEBERT DATED MARCH 1, 1988 ALLEGING DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF SEX BY M & G MILLWRIGHT LIMITED

BEFORE: ELIZABETH BECKETT, CHAIRPERSON

APPEARANCES:

Geri Sanson	Counsel for the Commission
George S. Chris, Q.C. E. Warder-Abicht	Counsel for M&G Millwright LTD.
Nancy Hebert	Appearing on her own behalf

I was appointed as a Board of Inquiry by the Minister of Citizenship on August 28,1992 to hear and decide the complaint of Nancy Hebert dated March 1,1988 alleging discrimination in employment on the basis of sex by M & G Millwright.

A conference call was convened in September and December dates were set for the hearing. On December 7,1992 after a lengthy argument a motion was granted to allow an adjournment so that Commission counsel could have access to certain records of employment held by the respondent. New hearing dates were set for February 22, 23 and 24th of 1993. At the commencement of the hearing respondent counsel filed material to support a motion to stay the proceedings because of the delay of almost five years since the laying of the original complaint in March of 1988. It was agreed by the parties that there would be no oral argument and the Board reserved judgement on this matter. Such judgement shall now be given.

DECISION ON MOTION TO STAY ON THE BASIS OF DELAY

The respondent sought to have this matter dismissed because of delay citing the jurisdiction of this Board to make such a ruling under section 23 of the Statutory Powers Procedure Act. (R.S.O. 1990,c.S. 22.) This section allows a tribunal to make such rulings to prevent abuse of its process. The passage of time in this matter from the date of the complaint to the date of appointment of this Board was about five years. Once this Board was appointed matters moved along more quickly with the actual hearing beginning some two and half months following the initial

conference call. The respondent cites Hyman v. Southam Murraay Printing Ltd. (1981,3 C.H.R.R. D/617). This often- quoted case states that it is appropriate to dismiss for delay when

> "the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred."

Guthro v.Westinghouse Canada Inc. (1991 15 C.H.R.R. D/32.) was also relied on because that case indicated that if documentary evidence was destroyed that may be a reason to dismiss for delay. The respondent argued that documents relevant to this case have been destroyed in that the results of welding tests given to the complainant are no longer available. The destruction of documents was troublesome in Guthro because not only had there been a nine year delay but also many of the people involved had since been retired from the company against which the allegations were made.

The respondent argued that the cause of the delay was the fault of the Commission's handling of the case and the fault of the complainant who failed to hire her own counsel which the respondent argued would have expedited this matter.

The Commission acknowledged institutional delay in the handling of this case, but alleges that 39 months of the delay is attributed to the respondent's failure to respond in a timely fashion to requests for information. The Board wishes to make part of the record that respondent's present counsel took over this case "more or less at the finish line of the marathon." (transcprit volume 4) The Commission pointed out that the loss

of the welding tests should not be seen as significant because the results of the tests are not in dispute.

This Board is not persuaded that the complainant having her own counsel would have had any discernible effect on the length of time it took this case to reach a hearing. It would seem very prejudicial to create two classes of complainants, those with and those without counsel. Unless there is clear evidence that the absence of counsel really did cause delay the mere absence of counsel cannot be used against a complainant to erase her right to a hearing.

After the hearing was concluded respondent counsel sent to this Board the recently released decision of Shreve v.Corporation of the City of Windsor as yet unreported. The Board has determined that this decision is in fact under appeal by the Commission and of course did not hear argument of this case from Commission counsel. The Board has, however studied the case and finds that it turns very much on its own unique set of rather complicated facts. In the Shreve case there was a combination of factors that moved the adjudicator to dismiss the complaint. Not only was there over six years from the time of the incident to the hearing; there was biased reporting by the Officer to the Commission and there was some lack of disclosure by the Commission which made it difficult for the respondents to prepare their case. It was these factors taken together that led to the decision to dismiss the complaint.

Motions to dismiss should be granted reluctantly as such a

ruling would deny relief to a blameless party, i.e. the complainant who has no other forum for her complaint as there is no tort of discrimination. The Hyman case has established a test that has been used by many Boards and this Board adopts it:

> "...while unreasonable delay might be a factor to take into account in refusing or fashioning a remedy...or in weighing the persuasive force or credibility of testimony or evidence, delay in initiating or processing a complaint should not be considered a basis for dismissing the complaint at the outset of the proceedings before the board of inquiry unless it has given rise to a situation in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred. Having been assigned, by order of the Minister..., a statutorily defined task of undertaking an inquiry ... the board should proceed to attempt to do so, notwithstanding the passage of time, unless the passage of time has made fulfilment of its task impossible."

In the case now before this Board there has been a five year passage of time the fault for which is shared between the parties. There has been some destruction of evidence but that evidence is not in dispute. There may be some dimming of memories but all the witnesses are available. To the extent that this case rests on credibility the delay can be taken into account when the Board must chose between conflicting testimony. This Board therefore dismisses the respondent's motion.

ADMISSIBILITY OF STATEMENTS OF A PRIORITY CASE HANDLING COMPLAINT

A second matter that was raised during the hearing was the admissibility of statements made to the Human Rights officer at the initial stages of this complaint process. In the usual

handling of Human Rights cases there is an initial investigation carried out and during this stage a fact-finding conference is held. After this stage there is a break and the conciliation stage is embarked on. "During the FFC, statements made by the parties will be recorded by the Commission staff, and can form part of the record of investigation. At the start of conciliation, however, it is made clear that statements made in that phase are privileged." (Human Rights in Ontario, 2nd edition, Judith Keene p.254) It is noted further that conciliation need not happen at the end of a case: "the timing of the officer's attempt to conciliate is not a matter of major importance." (Keen p.261)

The case before the Board was designated by Dorothy Barnes, the investigating officer, for Priority Case Handling (PCH). She said "If you know there is a complaint, a prima facie case, then you go in right away and try to resolve it if the facts speak for themselves. If there is just a hint or an indication then you know that you have got to draft a complaint right away, and we do a formal investigation." (transcript volume 2,p 152) The question raised by respondent counsel can be framed as follows: is PCH so aimed at resolution that in fact it becomes a process of conciliation and therefore any admissions made during a PCH should be privileged in the same way that any statements made during conciliation are privileged?

There were no cases presented where a Board of Inquiry had commented on this question.

It is useful to consider why there is a privilege established at the formal conciliation stage. A statement such as "Anything you say now will not become a matter of the record and therefore you may be open and frank and make an offer to settle this matter even if you do not fully agree that you have offended the Code." will allow parties to get down to brass tacks as it were. In order to avoid a long and expensive procedure an employer might for example say: "Perhaps I was out of line; but I don't think I offended any Code; however, I am prepared to ...." If this could be used in evidence against the employer she would not be prepared to offer to settle as such an offer would be an admission of liability. Although it is not a requirement conciliation is usually entered into after the Commission decides that there is at least a prima facie case of discrimination.

It must be assumed that every investigation is entered into with the hope of resolution. An experienced investigator may be able to sense when a case is going to be complicated and when it has at least the potential to be straightforward. Does the fact that the officer thinks a case is going to be straightforward and therefore treats it in a way that will lead to quick settlement make the case into one in which all communication is privileged?

Conciliation is designated by the Human Rights Officer not the respondent according to the procedure commented on both by Professor Tarnopolsky and by Judith Keene (Keene p 260 and following). Conciliation is meant to be a formal process in which the parties are specifically convened for that purpose and

formally told that is what is happening.

In this case the officer felt the complaint could be resolved. "I felt that maybe they weren't aware too much about, or they didn't have too much knowledge of the Code." (transcript volume 2 p 153) The officer felt that the respondents were naive and once the law was explained to them it would be over; i.e., resolved. As it became evident that it would not be so simple she advised the respondents to get a lawyer. This advice was given in a telephone conversation very near the beginning of the investigation.

It is the ruling of this Board that the procedure of Priority Case Handling does not attract the privilege protection of the conciliation process. PCH is an attempt by the investigating officers to order their case load so as to act more quickly on cases in which early intervention may for a variety reasons lead to resolution. Conciliation is formal process entered with notice to both sides that information exchanged will not be used against them; privilege afforded by the law gives that process credibility so that it can work. The early intervention in PCH cases that does not lead to resolution simply becomes part of the investigation.

DECISION ON THE MERITS OF THE CASE

M&G Millwright Ltd. (hereinafther refered to as M&G) is an operation that both fabricates and installs industrial equipment and machinery, largely for the agricultural sector. They employ

two types of millwrights: industrial millwrights who are concerned with the fabrication and construction millwrights who install the equipment at the site. Although both these millwright jobs involve welding skill, each job has its particular type of welding that is used most predominantly.

At M&G the operations are divided into two sectors, each with a manager. The fabricating is mainly carried out in the plant which is managed by Mr. Diebold as it was at the time of the events that are of concern to this inquiry. The installing or construction is mainly carried out on site by road crews managed by Mr. Beisel. Each manager is responsible for his own hiring and staffing decisions and the running of his department. M&G is an incorporated business; the president and chief executive officer is Mr. Gingrich.

On October 22, 1987 Nancy Hebert applied for a job as a millwright apprentice at M&G. Ms. Hebert had just successfully completed a forty-eight week full-time programme to train as an Industrial Mechanic at Conestoga College in Brantford Ontario. This course was part of the W.I.T.T. Programme - Women into Trades and Technology. Her grade reports indicated that Ms. Hebert had done very well in the course but although she had some field experience as part of the course she had little other formal experience in the area for which she was now trained. She testified that she had had lots of informal experience fixing cars and small machines and doing renovating work. Ms Hebert was told by a job counsellor at Conestoga College to contact a

certain person, this person told her that M&G were hiring. She had not seen an advertisement in the paper nor a formal description of the job, rather she was following up on a somewhat vague lead suggesting that M&G was hiring up to five people.

It is significant that when the complaintant contacted the respondent company she spoke to Mr. Diebold, that is the manager of the plant operations. The complainant testified that she was told by Mr. Diebold that Mr. Beisel was looking for apprentices to go on the road crew (transcript volume 2,p45). Mr. Diebold testified that he was hiring for plant personnel; he was looking for fitter/welders, welders, a shear brake press operator and a saw operator. He came to the conclusion after examining Ms. Hebert's resume and transcript of her college courses that she was more qualified for the road crew. He also testified that he was hiring experienced people as the volume of work at this time was very large and he would not have time to train someone (transcript volume 3,p 237 and following). He told the complainant that he would pass her application on to Mr. Beisel who would contact her.

As the above demonstrates there is disagreement about what took place. The complainant says she was told they <u>were</u> hiring for the road crew; Mr Diebold says he was hiring for the plant but only experienced workers and he would pass her application on to the person who did hiring for the road crew which he felt her qualifications better suited. After five years time it is understandable that people cannot recall exact

words and what each does recall has the nuance of what they now believe to be the case. In any event Mr. Diebold did pass on the application and Mr. Beisel did not call Ms. Hebert.

Early in November Ms. Hebert called the company to ask about the status of her application. She spoke to Mr. Beisel. Her testimony was that she was told that they could not hire her because it would cause discontent among the male workers whose wives would not want a woman on the crew. She was told that there was a general lack of privacy; the conditions were dirty and in the minds of the respondent this would not be a good idea for their company. She was not actually told there was no job; rather she was told that this was "an unsuitable job for a woman." In cross-examination Mr. Beisel did admit raising issues with the complainant that were consistent with her testimony. He admitted telling Ms Hebert about the lack of bathrooms in corn fields, and that the men's wives would be unhappy; he raised the issue of the company expecting men to share hotel rooms; he told her that one of the foremen said he would not want a woman on his crew. The evidence indicated that tone of the conversation was not hostile but that it seemed clear that hiring a woman would raise issues for this company. Mr. Beisel did not seem to regard this conversation over the phone as an interview. He was of the opinion that Ms. Hebert was not clear about the type of work carried on by M&G and that if she really understood she would not choose to work there or at least not on the road crew.

The testimony of Mrs. Barnes, the Human Rights Officer,

indicated that what the complainant wanted was a construction millwright position and she was willing to pay for half the hotel costs as she would be unable to share a room. The respondents did not dispute this offer was made.

Nancy Hebert called the Human Rights office about her treatment and subsequently was called by M&G and invited to come in for an interview for a factory job. It is the evidence of the respondents that there were no positions in the field for construction millwright apprentices. In order to work in the factory Ms. Hebert had to demonstrate that she could do the work of a welder because Mr. Diebold was looking for experienced people. She attended at the interview and was asked to perform three welding tests.

It is undisputed evidence that although she did well on one of the welds she did not perform the others properly. Her husband attended this interview with her and was there when the tests were done. Ms. Hebert testified that the reason she did not do well on the tests was because she was told she could not adjust the machine. This was disputed by the respondents who said there were no restrictions put on her. Ms. Hebert did not raise this allegation of unfairness at the time; her husband, who was also an experienced welder, did not raise the issue although the testimony about him suggested he was the type of person who would object if he felt the test was unfair. (He did not testify at the hearing.) Perhaps it did not occur to her to adjust the machine or perhaps she felt intimidated about touching the

machine but the Board accepts the testimony of the respondent that no restrictions were put on her. M&G were already involved with the Human Rights Office by this time and it seems incredible that they would have put such an obvious barrier in her way given all the circumstances. She did not adjust the machine and perhaps this is why the welds were so poor. She was not told to adjust the machine nor was she told not to; she simply did not. It should also be noted that Mrs. Barnes did not testify that the complainant raised any objections to the test when reporting to her about the outcome of the interview. Ms. Hebert had expressed some concern to Mrs. Barnes about the factory job prior to the interview because she was unsure if she had the qualifications.

The respondents claim that the results of the test indicated to them that the complainant would need at least two weeks of training to perform at the level they needed and they simply did not have the time to do this given the pressure the plant was under at that time. She was not offered a job.

Mr. Gringrich also gave testimony at the inquiry. Much of his testimony concerned the history of the operation and a description of the type of work carried out by M&G. He gave his testimony in a clear and helpful manner. He testified that in 1987 and 1988 M&G was very busy because they had received several large fabrication contracts. Although Mr. Gringrich did not actually do the hiring, this being left up to his managers, he produced documentary evidence from company records about the employment history of the corporation. The Board finds that

these documents accurately reflect the hiring of the corporation. Despite lengthy cross examination the credibility of these forms was not defeated.

The documents were exhibits numbered 19a, 19b, and 19c. Taken together they formed a complete history of the corporation's hiring from February 1987 to February 1992. These documents show that the only millwright apprentice hired in this period was K. Dan Schwartzentruber. Other positions filled in and around this period were for welders and fitter welders. This is consistent with the testimony of the respondents that they were not hiring road crew but were hiring for in-factory fabrication work. There was a millwright helper hired. This position was a regular temporary hire of a local farmer who picked up extra work at M&G once his crop was in. K. Dan (as Mr. Schwartzentruber is known) was hired on October 28th, 1987. The next millwright apprentice was hired in May of 1988; the next after that in December of 1988 and then another in November 1990 at which time a construction millwright was also hired. M&G has suffered from the economic slowdown and is currently operating with very few staff most of whom are job sharing.

The hiring of K.Dan came under close scrutiny. This witness impressed the Board as being a sincere young man. He had experience in the field of welding in his employment as a foreman in a factory. He applied for a job at M&G in July of 1987 while still employed elsewhere as he knew his then employer had sold the business. He was called for an interview at M&G in mid

October and asked to start November 1; as events transpired he started on the last Wednesday in October. When he was hired he was not asked to do any weld tests. He was hired to work on the road crew and the evidence was that the road crew did a different type of welding and were not given tests as a general rule.

The coincidence of these dates between the hiring of K. Dan and the interviewing of Nancy Hebert is striking. One person whose application is on file is hired mid October to start about two weeks later. The complainant meanwhile applies October 22 and there is no response to her application until she calls back at the beginning of November. She has much better formal training; while he is a local person who has good work experience. He is a man and she is a woman. He gets the job she does not. One cannot help but wonder what the outcome would have been had the sexes been reversed but the evidence is clear that when Ms. Hebert applied there was no apprentice millwright job available.

FINDING OF BOARD

> "Discrimination ...means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics...
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disportionate way, it is a signal that the practices that lead to this adverse impact may be discriminatory." Canadian National RailwayCo. v. Canada(Human Rights Commission,) 5 CHRR D/4210 at D/4227, para.33248

The finding of this Board is that Ms. Hebert did not get a job as a millwright apprentice on the road crew because there was not one available. It is the finding of this Board that she did not get the job of millwright apprentice in the factory because they were only hiring experienced people in that very busy period although at other times they had hired apprentices.

It is clear from the evidence, even disregarding the evidence of Ms. Barnes on any admissions made to her, that this operation hired locally; hired informally; and hired only men. To them the idea of hiring a woman to do millwright jobs was inconceivable. Raising issues such as lack of washrooms, lack of privacy, dirty working conditions, wives who would not like it, is the hallmark of stereotypical thinking that creates an insurmountable barrier to women in the work place. It is of little value for a woman to take the time and energy to train for non-traditional occupations if this type of attitude is allowed to persist in the work place. M&G discriminated against this complainant in their hiring process by treating her differently than a similar male applicant who would not be told about how dirty and dangerous the job was and asked if he really wanted to do that type of work knowing that if he needed to go to urinate during the day he would have to do so in a corn field. It was humiliating for the complainant to be treated in this paternalistic fashion when she applied for a job she was trained to do. Her right to be free from discrimination during the

hiring process was violated.

AWARD

This company will not be held liable for loss of wages for this complainant because it is the finding of the Board that the reason they did not hire her was that there was no suitable job.

The Code provides for awards of compensation under Section 41(1)(b) for loss arising out of the infringement of the Code. The Board awards the complainant $3,000 in damages for the injury suffered by the infringement of her right to be treated equally in the hiring process and the humiliation she suffered by the way she was indeed treated. Post-judgement interest shall be payable on the award from thirty days after the release of this decision at the rate set in accordance with the Courts of Justice Act.

It is further ordered that M & G Millwright Ltd. co-operate with the Human Rights Commission to draft a hiring and promotion policy that reflects the Ontario Human Rights Code. This Board agrees with the argument put forth by Ms. Warder-Abicht that the process of this inquiry has no doubt educated this corporation as to its duties and finds it would not be appropriate to require a formal programme to be set up under the guidance of an employment equity consultant as requested by the counsel for the Commission. The Board does order that M&G report on a regular basis to the Human Rights Commission on all applications received for any road crew or plant job (including temporary and part-time employment) for a two year period following the release of this Order. If any of

these applications are from females and no job offer is forth coming reason must be shown why the job was not offered to the female applicant.

It is ordered that M&G make it clear in their job advertisement, both formal and informal that the jobs are open to applicants of both sexes.

So ordered by Elizabeth Beckett, Chair, on the 8th day of June , 1993.

Elizabeth Beckett